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Introduction

This chapter contains a discussion of the federal statutes that can be used to investigate and prosecute various frauds against the government, including 18 U.S.C. § 1001 (false statements), 18 U.S.C. § 287 (false claims), and 18 U.S.C. § 371 (conspiracy to defraud the government), as well as the Department's working relationship with the agencies that investigate fraud against the government.

Related and supporting material can also be found in the Criminal Resource Manual:

Scope of the General Statutes Prohibiting Fraud Against the Government	Criminal Resource Manual at 901
1996 Amendments to 18 U.S.C. § 1001	Criminal Resource Manual at 902
False Statements, Concealment -- 18 U.S.C. § 1001	Criminal Resource Manual at 903
Purpose of Statute	Criminal Resource Manual at 904
Items Not Required to Be Proved	Criminal Resource Manual at 905
Jurisdictional Requirements Satisfied	Criminal Resource Manual at 906
Statements Warranting Prosecution	Criminal Resource Manual at 907
Elements of 18 U.S.C. § 1001	Criminal Resource Manual at 908
False Statement	Criminal Resource Manual at 909
Knowingly and Willfully	Criminal Resource Manual at 910

Materiality	Criminal Resource Manual at 911
Falsity	Criminal Resource Manual at 912
Department or Agency	Criminal Resource Manual at 913
Concealment--Failure to Disclose	Criminal Resource Manual at 914
False Statements as to Future Actions	Criminal Resource Manual at 915
False Statements to a Federal Investigator	Criminal Resource Manual at 916
Corporate Crimes	Criminal Resource Manual at 917
False Statements and Venue	Criminal Resource Manual at 918
Multiplicity, Duplicity, Single Document Policy	Criminal Resource Manual at 919
General Versus Specific Statutes	Criminal Resource Manual at 920
False Claims	Criminal Resource Manual at 921
Elements of 18 U.S.C. § 287	Criminal Resource Manual at 922
18 U.S.C. § 371: Conspiracy to Defraud the United States	Criminal Resource Manual at 923
Defrauding the Government of Money or Property	Criminal Resource Manual at 924
Obstructing or Impairing Legitimate Government Activity	Criminal Resource Manual at 925
Government Instrumentality	Criminal Resource Manual at 926
Anti-Kickback Act of 1986	Criminal Resource Manual at 927
Procurement Integrity Act	Criminal Resource Manual at 928
Obstruction of Federal Audit	Criminal Resource Manual at 929
Major Fraud Against the United States	Criminal Resource Manual at 930
Department of Defense Voluntary Disclosure Program	Criminal Resource Manual at 931
Provisions for the Handling of Qui Tam Suits Filed Under the False Claims Act	Criminal Resource Manual at 932
Medicare-Medicaid Frauds	Criminal Resource Manual at 933
Policy Statement of the Department of Coordination with the Statutory Inspectors Justice on Its Relationship and General of the Various Departments and Agencies of the United States	Criminal Resource Manual at 934
Implementation of the Policy Statement	Criminal Resource Manual at 935
Social Security Violations	Criminal Resource Manual at 936
Department of Agriculture-Food Stamp Violations	Criminal Resource Manual at 937
Department of Defense Memorandum of Understanding	Criminal Resource Manual at 938

9-42.010 Coordination of Criminal and Civil Fraud Against the Government Cases

A. The United States has both statutory (e.g., the False Claims Act, 31 U.S.C. §§ 3729-3733) and common law rights of action arising from fraud against the government and from the corruption of its officials. Every report of fraud or official corruption should be analyzed for its civil potential before the file is closed. In the first instance, this review should be conducted by an Assistant United States Attorney or Departmental Trial Attorney

assigned to the initial referral. Claims of fraud against the government involving more than \$1,000,000 in single damages plus civil penalties also should be referred to the Civil Division's Commercial Litigation Branch.

B. The Federal Bureau of Investigation has been directed to furnish both the Fraud Section of the Criminal Division and the Commercial Litigation Branch of the Civil Division with copies of all reports in all matters involving fraud against the government, or bribery or conflict of interest involving a public employee. Other federal investigative agencies are required to forward similar reports of investigation to the Branch Director or appropriate United States Attorney.

C. Cases pursued criminally must also be analyzed for civil potential. This analysis should be conducted at the earliest possible stage. Criminal dispositions by plea bargain should not waive or release the government's civil interests, except in return for adequate consideration, as measured by the Department's standards for civil settlements generally. Proposed civil dispositions involving over \$1,000,000 in single damages plus civil penalties must be referred to the Commercial Litigation Branch for approval. *See* 28 C.F.R. § 0.160, § 0.164, and Civil Division Directive No. 14-95, 60 Fed. Reg. 17457 (April 6, 1995), *reprinted in* 28 C.F.R. Pt. 0, Subpart Y, Appendix.

D. As to cases referred to it, the Commercial Litigation Branch notifies the appropriate United States Attorney and other interested offices within the Department of Justice of potential civil actions that come to the Branch's attention. The Branch coordinates its cases with the appropriate United States Attorney to ensure the pursuit of both civil and criminal redress. Cases are similarly coordinated within the United States Attorneys' offices. This coordination may include the simultaneous initiation of civil and criminal proceedings in cases in which the monetary recovery to the government and the deterrent effect will be enhanced, giving due consideration to the risks to the criminal case and the availability of protective orders and stays.

E. The attorney from the Commercial Litigation Branch or Assistant United States Attorney assigned to the matter follows the investigation as it develops and, where necessary, requests, in coordination with other interested offices of the Department of Justice, that an investigation be conducted relating to areas such as damages, which are particularly pertinent to civil actions. It is the policy of the Department to coordinate jointly the investigation of criminal and civil actions. The Attorney General issued a policy statement on coordination of parallel proceedings on July 28, 1997, emphasizing the importance of coordinating parallel civil, criminal and administrative proceedings. A copy of this policy statement is in the Criminal Resource Manual at 2464. An Attorney General memorandum to the United States Attorneys dated July 16, 1986 states that "where possible, documents should be obtained by methods other than grand jury subpoenas." This Attorney General memorandum encourages the use of Inspector General subpoenas as an alternative to grand jury subpoenas in those cases where an Inspector General has determined that such usage is appropriate.

F. The Branch attorney or Assistant United States Attorney assigned to the matter, should give consideration at the earliest possible date to the initiation of civil action and advise other interested offices in the Department or United States Attorneys' offices of any contemplated civil action. Absent a specific, detailed statement that there is a strong likelihood that institution of a civil action would materially prejudice contemplated criminal prosecution of specific subjects, the decision to institute civil action is governed solely by the standards specified in 38 Op. Att'y Gen. 98 (1934). That is, the suit is instituted unless there is (1) doubt as to collectibility or (2) doubt as to the facts or law.

G. Provisional relief may be sought in cases in which the investigation warrants the conclusion that dissipation of any substantial amounts of assets is likely, notwithstanding the degree to which the criminal aspects of the matter have been concluded. The Commercial Litigation Branch and/or assigned Assistant United States Attorney should advise other interested offices of the Department or United States Attorneys' offices of any provisional action. Such provisional relief is sought unless there is a clear likelihood that efforts to prevent dissipation of assets would materially prejudice criminal prosecution of specific subjects. Where there is a possible criminal component to the case, the criterion for determining "substantial assets" is set at \$50,000, which is the minimum debt that must exist for the United States to obtain discovery in connection with a request for

provisional relief under the Federal Debt Collection Procedures Act, 28 U.S.C. § 3015(b). In cases in which assets of \$50,000 or more may be dissipated, efforts at provisional relief to secure recovery on behalf of a client agency should, if a conflict exists, be resolved within the Department at the appropriate level.

H. The Commercial Litigation Branch and the United States Attorneys offices are accorded significant latitude in urging client agencies to withhold payment of claims presented by any subject known to have engaged in fraudulent conduct. The Branch will advise the appropriate United States Attorney's Office and other interested offices of the Department when taking such actions. Absent a specific, detailed statement that withholding action would materially prejudice contemplated criminal prosecution of specific subjects, the decision to withhold is governed by the usual Department standards. The government's common law right to withhold payment by setoff has been upheld by the United States Supreme Court. *United States v. Munsey Trust Co.*, 332 U.S. 234 (1947). Withholding is an important tool for effecting civil redress, and in recent years the government has successfully defended a number of cases in which client agencies have employed this self-help remedy. See, e.g., *Peterson v. Weinberger*, 508 F.2d 45 (5th Cir. 1975); *Brown v. United States*, 524 F.2d 693 (Cl. Ct. 1975), as amended, (1976); *Continental Management, Inc. v. United States*, 527 F.2d 613 (Cl. Ct. 1975). The negotiation of favorable settlements in unliquidated matters also may be enhanced by the bargaining leverage which withholding affords. Client agencies also should be urged to withhold pay and retirement benefits to Federal employees separated because of evidence of wrongdoing. The current regulations regarding the withholding or setoff of backpay are found at 4 C.F.R. § 102.3, 5 C.F.R. §§ 550.805(e)(2), 845.206(b). The current regulations regarding the withholding or setoff of retirement benefits are found at 4 C.F.R. § 102.4 and 5 C.F.R. §§ 179.213(a)(4), 831.1306, 831.1801, 845.206(a).

I. The existing delegations of authority to file suit, settle or close civil fraud claims are set forth in 28 C.F.R. § 0.160, § 0.164, and Civil Division Directive No. 14-95, 60 Fed. Reg. 17457 (April 6, 1995), reprinted in 28 C.F.R. Pt. 0, Subpart Y, Appendix. They provide for redelegation of the authority of the Civil Division's Assistant Attorney General over fraud claims (set out in 28 C.F.R. § 0.45(d)) to the Division's Branch Directors and United States Attorneys in certain circumstances. Under Directive 14-95, the United States Attorneys are authorized to file suit, close a case, or "take any other action necessary to protect the interests of the United States," wherever "the gross amount of the original claim does not exceed" \$1,000,000. Directive No. 14-95, § 1(c). Agencies are also authorized to refer matters directly to United States Attorneys involving "[m]oney claims by the United States, except claims involving penalties and forfeitures, where the gross amount of the original claim does not exceed \$1,000,000." *Id.* § 4(a)(1).

In the following instances, cases within the monetary range normally within the authority of the United States Attorneys shall not be delegated and shall be submitted to the Assistant Attorney General: (1) where a proposed action "will control or adversely influence the disposition of other claims totaling more than" the amount within the United States Attorney's authority, *id.* § 1(e)(1); (2) where "a novel question of law or a question of policy is presented," *id.* § 1(e)(2); where the "agencies involved are opposed to the proposed action," *id.* § 1(e)(3); and (4) where, "for any other reason, the proposed action should * * * receive the personal attention of the Assistant Attorney General, Civil Division," *id.* § 1(e)(2).

The Directive also provides that "[a]ny case involving bribery, conflict of interest, breach of fiduciary duty, breach of employment contract, or exploitation of public office" will "normally" not be delegated to United States Attorneys for handling. *Id.* § 4(c)(4).

Similarly, "[a]ny fraud or False Claims Act case where the amount of single damages, plus civil penalties, if any, exceeds \$1,000,000" will "normally" not be delegated to United States Attorneys. *Id.* § 4(c)(5). Nevertheless, upon the recommendation of the Director, Commercial Litigation Branch, "the Assistant Attorney General, Civil Division may delegate to United States Attorneys suit authority involving any claims or suits where the gross amount of the original claim does not exceed \$5,000,000 where the circumstances warrant such delegations." *Id.* § 4(b). Any authority exercised by the United States Attorneys under Directive No. 14-95 may

be redelegated to Assistant United States Attorneys who supervise other Assistant United States Attorneys handling civil litigation. *Id.* § 1(d).

Where the matter was originally within their authority, United States Attorneys may accept any offer in compromise where either the gross amount of the original claim or the principal amount of the proposed settlement does not exceed \$1,000,000, *id.* §§ 1(b)(2)(a) & (b). In cases where the gross amount of the original claim is more than \$1 million but less than \$5 million, the United States Attorney may accept any settlement in which "the difference between the gross amount of the original claim and the proposed settlement does not exceed \$1,000,000." *Id.* § 1(b)(2)(a)(ii).

Inquiries should be directed to: Director, Commercial Litigation Branch, Civil Division, and Chief, Fraud Section, Criminal Division.

J. Each United States Attorney's Office has an Affirmative Civil Enforcement (ACE) coordinator, who should be consulted on issues arising from parallel criminal and civil cases.

9-42.160 False Statements to a Federal Criminal Investigator

It is the Department's policy not to charge a Section 1001 violation in situations in which a suspect, during an investigation, merely denies guilt in response to questioning by the government. This policy is to be narrowly construed, however; affirmative, discursive and voluntary statements to Federal criminal investigators would not fall within the policy. Further, certain false responses to questions propounded for administrative purposes (e.g., statements to border or United States Immigration and Naturalization Service agents during routine inquiries) are also prosecutable, as are untruthful "no's" when the defendant initiated contact with the government in order to obtain a benefit. See the Criminal Resource Manual at 916 for a brief discussion of the case law.

Prior consultation with the Criminal Division is not required before initiating prosecutions for false statements to Federal investigators; however, the Fraud Section is available for consultation on cases involving these principles.

9-42.191 Application of Appropriate Statute

It is the policy of the Department that in those instances in which the United States Attorney has a choice of statutes, charges normally should be brought pursuant to the more specific statute. In those cases in which special aggravating circumstances exist, the United States Attorney retains the discretion to charge a violation of the more serious general statute. *See also* the Criminal Resource Manual at 920 (General versus Specific Statutes).

9-42.420 Federal Procurement Fraud Unit

In August 1982, the Attorney General and the Secretary of Defense established the Defense Procurement Fraud Unit in the Criminal Division's Fraud Section to help concentrate and coordinate the law enforcement resources of the Department in prosecuting significant procurement fraud cases involving the Department of Defense's ("DOD") multi-billion dollar procurement of equipment and services. That unit is now called the Federal Procurement Fraud Unit, and handles a variety of fraud cases affecting both civilian and defense agency procurements, including product substitution, false testing, cost mischarging, defective pricing, and kickback cases. In addition to conducting major procurement investigations, the Unit provides expertise and guidance on procurement fraud issues to investigative agencies and United States Attorneys' Offices that request their assistance.

9-42.430 Department of Defense Voluntary Disclosure Program

In July 1986, the Department of Defense initiated its Voluntary Disclosure Program which is designed to encourage self-policing and voluntary disclosure by Defense contractors of procurement-related problems. The Fraud Section's Federal Procurement Fraud Unit is the contact point in the Department of Justice to oversee voluntary disclosure matters. See the Criminal Resource Manual at 931 for a further information concerning the Unit's responsibilities and procedures.

9-42.440 Provisions for the Handling of Qui Tam Suits Filed Under the False Claims Act

In 1986, Congress amended the False Claims Act, 31 U.S.C. § 3729 *et seq.*, *see generally* False Claims Act Amendments of 1986, Pub.L. 99-562, 100 Stat. 3153 (October 27, 1986), *reprinted in*, 10A USCCAN (December 1986). One of the Congress's objectives in modifying the Act was to encourage the use of qui tam actions in which citizens are authorized to bring, as "private Attorneys General," lawsuits on behalf of the United States alleging frauds upon the government.

When United States Attorneys receive information about a qui tam action, they should promptly forward a copy of the complaint and statement of evidence to the Commercial Litigation Branch of the Civil Division, particularly because relators frequently fail to serve the Attorney General or delay in doing so. The Commercial Litigation Branch will contact the agency involved, the Criminal Division, and, frequently, the Inspector General of the agency, to determine if the allegations are known to them and to obtain an assessment of the material evidence furnished by the relator. The Criminal Division will, in turn, check with appropriate United States Attorneys' offices USAOs and investigative agencies to determine if the allegations relate to a pending criminal investigation. Because of the 60-day deadline, it must be emphasized that a prompt response is required to these inquiries.

See the Criminal Resource Manual at 932 for an additional discussion of this issue.

9-42.451 Plea Bargaining in Medicare-Medicaid Frauds

A potential problem area has been identified regarding the practice of plea bargaining as it relates to administrative sanctions available to the Health Care Financing Administration, United States Department of Health and Human Services (HHS), in Medicare-Medicaid fraud cases.

Specifically, provision 229 of Pub.L. No. 92-603, enacted on October 30, 1972, amended Sections 1862 and 1866(b) of the Social Security Act to enable the Secretary of HHS to deny payment under Title XVIII of the act upon determining that a provider or person has committed fraud or abuse against the Medicare program. Subsequent to such determinations, Section 1903(i)(2) of the act also prohibits Federal financial participation (FFP) for payments to these providers or persons in the Medicaid program. In addition, the legislation (Pub.L. No. 95-142, Medicare-Medicaid Anti-Fraud and Abuse Amendments) enacted on October 25, 1977, contains a provision (Section 7) that requires the Secretary of HHS to suspend program participation for a physician or individual practitioner convicted of a criminal offense involving the Medicare or Medicaid programs. Suspension from program participation is immediate and applicable to both programs. The Section 7 provision is incorporated in the Code of Federal Regulations at 42 C.F.R. § 405.315-2 for Title XVIII and at 42 C.F.R. § 450.85 for Title XIX.

Since the administrative sanction would generally be effectuated after any criminal proceedings, plea bargains that include commitments to forego or restrict administrative remedies, which the HHS may elect to pursue under the aforementioned provisions, should be rare and made only after obtaining prior explicit approval from the Criminal Division.

See USAM 9-16.000 *et seq.* and 9-27.000 *et seq.* for additional guidance regarding plea agreements.

See the Criminal Resource Manual at 933 for further discussion of the Medicaid/Medicare Programs and statutes that can be used to prosecute fraud against these programs. *See also* USAM 9-44.000 *et seq.* (Health Care Fraud).

9-42.500 Referral Procedures -- Relationship and Coordination With the Statutory Inspectors General

A. Policy Statement of the Department of Justice on its Relationship and Coordination with the Statutory Inspectors General of the Various Departments and Agencies of the United States: The investigation and prosecution of fraud and corruption in federal programs is a major priority of the Department of Justice. On June 3, 1981, the Deputy Attorney General issued a "Policy Statement of the Department of Justice on its Relationship and Coordination with the Statutory Inspectors General of the Various Departments and Agencies of the United States." This statement is summarized in the Criminal Resource Manual at 934. The statement was first announced at a meeting of the President's Council on Integrity and Efficiency (Inspectors General group) and was the result of a combined effort of the Criminal Division, the Federal Bureau of Investigation (FBI) and the Executive Office for United States Attorneys.

The policy statement has two principal purposes: an early alert system for prosecutors relative to ongoing investigations and increased emphasis on coordination and cooperation between the FBI and the Inspectors General. Several particular provisions deserve special emphasis. Consistent with an Inspector General's obligation to "report to the Attorney General whenever the Inspector General has reasonable grounds to believe there has been a violation of law," the Inspector General is to report to "the United States Attorney in the District where the crime occurred." Simultaneously, the Inspector General is expected to notify the appropriate FBI field office. The FBI is committed to investigating every criminal violation which the prosecutor determines will be prosecuted, if proved.

The timing of the report to the prosecutor is discussed in the policy statement. In an ordinary investigation involving completed events, the policy statement simply tracks the Inspector General legislation and requires a report whenever there are reasonable grounds, i.e., some evidence to believe that a Federal crime has occurred. Immediate reporting is required for crimes of an ongoing nature and organized crime allegations. Such urgent and sensitive matters often require use of sophisticated investigative techniques, and the Inspector General is to make an immediate report upon receipt of the information. The policy statement requires the FBI to advise the appropriate Inspector General when it initiates an investigation and to keep the Inspector General regularly informed of its progress.

B. Implementation of the Policy Statement: Since the Department of Justice issued the June 3, 1981 policy statement, there have been discussions over its meaning, with requests from various Inspectors General and the FBI for further clarification of their respective investigative responsibilities.

The Department is concerned about the allocation of limited investigative resources and the possibility of competitive and, at times, redundant and unproductive relationships among law enforcement agencies. The policy statement addresses these issues and establishes a structure for early reporting of instances of criminality to the prosecutor. As a further refinement, to set out more clearly the Department's expectations regarding the use of the limited investigative resources in both the FBI and the Offices of individual Inspectors General, the policy statement has been supplemented by a February 19, 1982 statement on the implementation of the policy statement (see the Criminal Resource Manual at 935), which allocates investigative responsibility between the Inspectors General and the FBI with respect to four types of crime in which both have an investigative interest (1) bribery, (2) significant allegations of fraud involving federal employees, (3) organized crime matters and (4) fraud against the government.

Implementation of the policy statement requires the cooperation and support of the United States Attorneys, the FBI, and the Inspectors General. The Fraud Section of the Criminal Division is charged with overseeing the operations of the policy and resolving any uncertainties or differing interpretations which arise in its implementation. Any questions or information should be directed to the Fraud Section.

9-42.510 Social Security Fraud

Pursuant to an agreement reached between the Department of Justice and the Social Security Administration (SSA) in April 1977, the SSA will not refer matters in which one or more of the factors below is present unless additional aggravating circumstances are present:

- A. The suspect is 75 or more years old;
- B. The suspected violation did not result in improper payment. This exception does not apply in criminal misuse cases such as conversion by a representative payee, SSN misuse or improper disclosure;
- C. There is evidence that the suspect has an illness expected to result in his/her death in the near future; or
- D. The suspected violation is solely a failure to disclose an increase in a pension amount.

The SSA has discontinued its procedure of summarizing each case involving one or more of the aforementioned factors and recommending against further action. The SSA will, however, continue to take administrative action directed toward recovering any overpayments in those cases not warranting criminal prosecution. Matters in which the factors cited above are either not present or not compelling will be referred with an appropriate recommendation.

Each referral with a recommendation for prosecution contains the name and telephone number of the SSA Regional Integrity Specialist familiar with the facts of the case. You are invited to contact that individual for discussion or additional investigation.

For additional discussion of Social Security Numbers and criminal violations involving misuse of Social Security Numbers, see the Criminal Resource Manual at 936.

9-42.530 Department of Defense Memorandum of Understanding

In August 1984, the United States Attorney General and the Secretary of Defense signed a Memorandum of Understanding ("MOU") between the Departments of Justice and Defense relating to the investigation and prosecution of certain crimes. Special attention is directed to the treatment of investigative jurisdiction of corruption, fraud and theft cases. The prosecutor has the responsibility to

- (1) concur before Department of Defense can initiate any corruption investigation;
- (2) confer to determine investigative jurisdiction in all fraud and theft matters; and
- (3) concur before the Department of Defense initiates any administrative investigation or actions during the pendency of any criminal investigation.

The MOU was developed with the expectation that the more complex cases require the joint efforts of the Departments of Defense and Justice. In this regard a repeated theme of the MOU is the prosecutor's responsibility for coordinating and effectuating the various interests of the United States. The Federal Procurement Fraud Unit, Fraud Section, Criminal Division, of the Department of Justice has developed substantial expertise in these investigations and can assist in structuring and conducting the investigations requiring expertise from the FBI and Department of Defense. Questions concerning the MOU should be directed to the Justice Department's Fraud Section, Criminal Division.

See the Criminal Resource Manual at 938 for the text of the MOU.